Supreme Court, U.S.
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NO. 94-

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

DANIEL JOSEPH MARAVILLA and
RAFAEL JESUS DOMINGUEZ,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent

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Petition for Writ of Certiorari
To the United States Court of Appeals

For the First Circuit

==========

PETITION FOR WRIT OF CERTIORARI

Daniel Joseph Maravilla
#02165-069
Rafael Jesus Dominguez
#32274-004
3625 FCI Road
Marianna, Florida 32446

QUESTIONS PRESENTED

I. DID THE DISTRICT COURT ABUSE ITS DISCRETION WHEN PRESENTED WITH AN ABUNDANCE OF NEW EVIDENCE BY DENYING THE MOTION FOR NEW TRIAL SANS AN EVIDENTIARY HEARING?

II. DID THE DISTRICT COURT COMMIT PLAIN ERROR IN NOT VACATING THE SENTENCES AND ODERING A NEW TRIAL WHEN IT WAS PRESENTED WITH AN IDENTIFIABLE BRADY ISSUE IN VIOLATION OF THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION?

III. DID THE COURT BELOW EXCEED ITS AUTHORITY ON APPEAL BY SPECIFICALLY IGNORING THE PRECEPTS ENNUCIATED BY THIS COURT IN MESOROSH V. UNITED STATES?

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RAFAEL JESUS DOMINGUEZ,
Petitioners,
v.
UNITED STATES OF AMERICA,
Respondent

Petition for Writ of Certiorari
To the United States Court of Appeals

For the First Circuit

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES SUPREME COURT OF APPEALS FOR THE FIRST CIRCUIT

Petitioners, Daniel Joseph Maravilla and Rafael Jesus Dominguez, pro se, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the First Circuit refusing to grant petitioners a new trial pursuant to Rule 33, Federal Rules of Criminal Procedure, after they had been deprived of due process of law.

OPINIONS BELOW

The unpublished opinion of the Court of Appeals is reported as United States v.

Maravilla, 7 F. 2d 219 (1st Cir. 1993), and appears in Appendix A to this Petition. The unpublished written opinion of the District Court for the District of Puerto Rico appears in Appendix B to this Petition. The Court of Appeals' denial of the Petition for Rehearing and Suggestion for Rehearing En Banc appears in Appendix C.

JURISDICTION

The Court of Appeals' Opinion in this matter was filed on September 28, 1993. A timely Petition for Rehearing and Suggestion for Rehearing En Banc was filed on October 12, 1993. The Court of Appeals' denial of the Petition for Rehearing and Suggestion for Rehearing En Banc was issued on November 16, 1993, and is set forth in Appendix C. This Court's jurisdiction is invoked under Title 28, U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment V to the United States Constitution is set forth in Appendix D.

STATEMENT OF THE CASE

The United States District Court for the District of Puerto Rico had jurisdiction pursuant to Rule 33, Federal Rules of Criminal Procedure.

On May 13, 1987, a federal grand jury sitting in San Juan, Puerto Rico, returned an eight (8) count indictment against Daniel Joseph Maravilla and Rafael Jesus Dominguez, charging them with violations of 18 U.S.C. Sec. 1951(1) and 2, 18 U.S.C. Sec. 2314 and 2, 18 U.S.C. Sec. 2315 and 2, 18 U.S.C. Sec. 1503, 18 U.S.C. Sec. 1001, and 18 U.S.C. Sec. 1623. On September 8, 1987, a jury trial commenced and on September 15, 1987, the jury returned its verdict of guilty on all counts.

On June 28, 1990, the United States Court of Appeals for the First Circuit affirmed in part and reversed in part the Judgment of the District Court. United States v. Maravilla, 907 F. 2d 216 (1st Cir. 1990).

On January 29, 1991, the District Court, on remand, sentenced each Defendant to fifty

(50) years and a fine of $30,000.00. The United States Court of Appeals for the First Circuit affirmed. United States v. Dominguez, 951 F. 2d 412 (1st Cir. 1991). On May 18, 1992, the Court denied certiorari. United States v. Dominguez, _____ U.S. _____, 112 S.Ct. 1960, 118 L. Ed. 2d 562 (1992).

On June 8, 1992, in anticipation of filing a motion for a new trial, Petitioners filed a motion for recusal pursuant to 28 U.S.C. Sec. 455. On June 22, 1992, Petitioners, pursuant to Rule 33, Fed. R. Crim. P., filed a motion for a new trial based on newly discovered evidence. On July 24, 1992, the District Court denied Petitioners' motion for recusal. On August 7, 1992, the United States filed an opposition to Petitioners' motion for a new trial. On August 31, 1992, Petitioners filed a response to the government's opposition to their motion for a new trial. On March 5, 1993, the District Court denied Petitioners' motion for a new trial without a hearing. On March 10,

1993, Petitioners filed a timely notice of appeal accompanied by the full filing and docketing fees.

On April 26, 1993, Petitioners filed their Opening Brief in the Court below. On June 4, 1993, the United States filed the Brief for the United States. On June 28, 1993, Petitioners filed their Reply Brief. On September 28, 1993, the court below affirmed the District Court (see Appendix A). On October 12, 1993, Petitioners filed a timely Petition for Rehearing and Suggestion for Rehearing En Banc. On November 26, 1993, the court below denied the Petition for Rehearing and Suggestion for Rehearing En Banc (see Appendix C).

On May 21, 1987, prior to trial, the government informed the trial court that all discovery would be sent to respective defense counsel within five days. On June 25, 1987, petitioner Dominguez made a demand for production of favorable evidence, as well as a supplemental demand for production of

favorable evidence. On July 8, 1987, Petitioner Maravilla filed a motion for disclosure of all government immunity agreements and promises of leniency; for disclosure of government informants and opportunity to interview same, for exculpatory material and/or material sufficient to create a reasonable doubt; and for disclosure of impeaching information. On July 23, 1987, petitioner Dominguez made a demand for additional favorable evidence.

In January 1991, almost three-and-one-half years after conviction, while confined in MCC-Miami awaiting removal to the District of Puerto Rico for purposes of re-sentencing after remand on direct criminal appeal, petitioners first became aware of the prior perjured testimony and criminal enterprise activities of key prosecution witness Jose Gonzalez while reading the January 10, 1991, edition of The Miami Herald. This precipitated the discovery of an earlier article concerning Gonzalez which appeared in

the January 25, 1990, edition of The Miami Herald. After learning of Gonzalez's perjured testimony, petitioners obtained Gonzalez's perjured testimony given in a criminal proceeding in the Essex County, New Jersey Superior Court on June 6, 1984, almost three (3) years before petitioners' indictment. Petitioners also obtained portions of the criminal trial transcript of key government witness Jose Gonzalez [U.S. District Court for the Southern District of Florida, United States v. Gonzalez, No. 89-0712-CR-Davis], which revealed even more perjurious activities by Jose Gonzalez.

Just days before petitioners filed their motion for a new trial, they became aware, for the first time, that the pathologist who performed the autopsy in the case petitioners were charged in had been involved in the preparation of false autopsy reports with certain crooked members of the Police of Puerto Rico, as reported in El Neuvo Dia-Viernes on May 1, 1992.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted for three reasons: The district court abused its discretion by denying the motion for new trial without conducting an evidentiary hearing; that the district court committed plain error in not vacating petitioners' convictions and ordering them a new trial when presented with an identifiable Brady issue in violation of their due process rights; and that the Opinion of this Court in Mesarosh v. United States, 352 U.S. 1, 77 S. Ct. 1, 1 L. Ed. 2d 1 (1956), demands that petitioners' convictions be reversed and they be granted a new trial.

While district courts are not obliged to provide evidentiary hearings on demand; United States v. Panitz, 907 F. 2d 1276, 1273 (1st Cir. 1990); petitioners asseverate that they made an adequate threshold showing that material facts were in genuine doubt or dispute. Petitioners contend that the district court, in abjuring the evidentiary hearing, committed an egregious abuse of

discretion. United States v. Carbone, 798 F. 2d 21, 29 (1st Cir. 1986); United States v. Lilly, 983 F. 2d 300, 311 (1st Cir. 1992). Unlike Lilly and its progeny, the district court here not only turned a deaf ear to petitioners' requests, it also turned a blind or jaundiced eye on the ice cold facts of this case in denying an evidentiary hearing that was, at a minimum, exigible. It is inconceivable how the court below could ignore this egregious abuse of discretion by the district court when presented with a veritable cornucopia of hard evidence supporting petitioners' claims for a new trial. As the court below noted in Panitz, (supra at 1273) "the test for granting an evidentiary hearing in a criminal case should be substantive: did the defendant make a sufficient threshold showing that material facts were in doubt or dispute?"

Petitioners, upon learning of Gonzalez's criminal activities, began to painstakingly garner sufficient evidence which would justify

an evidentiary hearing on their motion for a new trial. No stone was left unturned. Neither the court below nor the district court determined that the evidence they had unearthed about Jose Gonzalez and Dr. Rafael Criado was known to the defendants at time of trial; or that the discovery of such evidence was due to a lack of diligence on petitioners' part; or that the evidence was not material. It is the fourth prong of the First Circuit's so-called "Wright-Martin test" which creates the sticky wicket, the requirement that the evidence, if revealed to the jury, would probably result in an acquittal upon re-trial. United States v. Wright, 625 F. 2d 1017 (1st Cir. 1980); United States v. Martin, 815 F. 2d 818 (1st Cir. 1987). The district court opined that petitioners "have not shown a probability of reversal," specifically with regard to the testimony of Jose Gonzalez. The court below adopted the findings of the district court. Petitioners have steadfastly maintained that in their particular situation,

the so-called Larrison rule should apply, where a less stringent test than that of "probability-of-reversal" is applied, and that is should only be required that the district court be "reasonably well satisfied" that Gonzalez had previously given false testimony and that without knowledge of same the jury "might have reached a different conclusion." Larrison v. United States, 24 F. 2d 82, 87 (7th Cir. 1928). This rule has even been applied in the district where petitioners were tried. United States v. Bonilla, 503 F. Supp. 626, 628-29, (D.C.P.R. 1980).

There being a division of the Circuits in this regard, petitioners would urge this Court to grant certiorari and resolve such conflict between the Circuits.

In regard to the testimony of Jose Gonzalez and Dr. Rafael Criado, the United States attempted, throughout the proceedings below, to relegate the testimony of Gonzalez and Criado as "cumulative." Petitioners have never before observed such a consummate

display of legerdemain. Even the district court was deluded with this skillful use of smoke and mirrors.

The trial record is unequivocal: Jose Gonzalez and Dr. Rafael Criado were key witnesses for the United States. The importance of both their testimonies is related in Maravilla, 907 F. 2d 216. The combination of their testimonies bootstrapped the government's case to win a conviction. Without Gonzales and Criado, the defense would have prevailed.

Gonzalez's prior perjury in New Jersey was critical to impeaching his testimony before the jury at trial. And analogous to United States v. Biberfield, 957 F. 2d 98, 104 (3rd. Cir. 1992) petitioners could not raise the perjury issue at trial because they had no knowledge or proof of it. Inasmuch as Gonzalez's credibility was a major factor of central importance to the jury - he was portrayed as a diligent, hard-working police officer with the full panoply of an "aura of

legitimacy" - we can only assume that had the jury been aware of the other half of Gonzalez's Jekyll and Hyde persona this could have become every bit as important as the factual elements of the crime itself. Giglio v. United States, 405 U.S. 150, 154, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); Napeu v. Illinois, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

Based on this single fact, a reversal of the district court's decision is required.

Both the weight of the new evidence and the credibility of witnesses are to be considered by the district court. United States v. Zannino, 468 F. 2d 1299, 1303 (1st Cir. 1972), cert. denied, 410 U.S. 954, 93 S. Ct. 1419, 35 L. 3d. 2d 687 (1973); United States v. Street, 570 F. 2d 1, 2 (1st Cir. 1977).

It cannot be discounted that two separate, independent sources of reliable information bring us this newly discovered evidence that Dr. Rafael Criado, the primary

coroner to testify in the trial of petitioners, was nothing less than a crook. First, we can turn to the observations of the court below in United States v. Torres Lopez, 851 F. 2d 520, 526 (1st Cir. 1988), where it stated that " ... [M]aldanado was then asked to inform the jury of all the crimes in which he had been involved. During his lengthy recital, he named seven persons whom he alleged had participated with him in some of his crimes: **Dr. Cirado, a pathologist; . . .** Maldonado's testimony can be summarized as follows: **Dr. Criado helped him cover-up the homicide of a person named Papo Bolso."** This was later confirmed in hearings before the Puerto Rico Senate as reported in El Neuvo Dia-Viernes on May 1, 1992. One cannot help but wonder what the reactions of the jurors had been had they been privy to the criminal predispositions of Dr. Rafael Criado. It is an affront to our system of justice when the United States will parade a pair of inveterate perjurers before a jury to win a conviction.

The record below indicates numerous and substantive request for Brady material. Brady v. Maryland, 373 U.S. 33, 83 S. Ct. 1994, 10 L. Ed. 2d 215 (1963). The critical question here is what did the United States know about Jose Gonzalez and when exactly did they know it? Notwithstanding government assertions to the contrary, Gonzalez was the linchpin of the prosecution's case. His testimony was literally the "smoking gun", as it were, and as the appellate court noted on direct appeal, testimony by Gonzalez about possible alterations of the .357 caliber revolver was evidence that tended to show guilt. Maravilla, 9067 F. 2d at 222.

The staring point for evaluating the materiality of Brady evidence was established in United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976), wherein this Court determined that "[w]hen the prosecutor receives a specific relevant request, the failure to make any response is seldom, if ever, excusable." Id. at 426 U.S.

106. We should keep in mind also that if the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor. Id. This Court went on to say in Agurs that "[I]t necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed." Id 427 U.S. at 112.

Oddly enough, even the United States grudgingly admitted in its district court pleadings that it knew of the criminal investigation into Gonzalez's activities at least one month before they used him as a witness against petitioners and the district court concluded that the government was at least aware of Gonzalez's perjury one month before trial. Such withheld information, which might have had some impact on the outcome of petitioners' trial, was suppressed by the United States, and just as the First Circuit determined in United States v. Lau,

828 F. 2d 871, 977 (1st Cir. 1987), these petitioners should have been granted a new trial because of this blatant Brady error. United States v. Bagley, 473 U.S. 667, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985). And not unlike Ouimette v. Moran, 942 F. 2d 1, 9 (1st Cir. 1991), petitioners made more than one request for such impeachment materials.

Petitioners submit that the jurors had a right to know of the circumstances surrounding the prior perjury of Gonzalez. "The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt of innocence . . ." Bagley, (supra), [citing Napue, (supra)]. One could hardly conclude that Gonzalez would be either truthful or reliable given his propensity for deceit and prevarication and a proven track record of lying at every given opportunity. This is especially true when, at the time of his appearance as a witness in petitioners' trial, he was in the midst of a major criminal enterprise operation himself, for which he was

later sentenced to twenty (20) years in federal prison.

That the jury had a right to know this information about Gonzalez goes without saying. As Napue tells us (360 U.S. at 269) "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go unconnected when it appears." This rationale extends to impeachment evidence. The thrust of Giglio and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony. We cannot overlook the important factor that in the prosecutor's summation to the jury, she not only adopted Gonzalez's prior perjured testimony, but capitalized on it. She relied heavily on Gonzalez's testimony in her summation to the jury in relation to the gun. Without him, contrary to the conclusions of the court below the government did not have a case on petitioners. It is difficult to imagine a more compelling fact that the jury should have in order to properly evaluate

whether a witness of doubtful credibility was in fact being credible in his trial testimony. DeMarco v. United States, 928 F. 2d 1074 (11th Cir. 1991).

Timely release of the requested material would have enabled petitioners to seriously undermine the credibility of Gonzalez with the trial jurors, while undermining confidence in the outcome, thus resulting in a different result. From a procedural standpoint, Gonzalez had a tremendous impact on petitioners' convictions. Discovery into this investigation would have shown that Gonzalez had committed perjury in a proceeding similar to petitioners' trial. Therefore, the discovered evidence would be beyond that of more impeachment and a new trial would be necessary to "remove the taint" from petitioners' convictions. United States v. Espinosa-Hernandez, 918 F. 2d 911, 914 (11th Cir. 1990). Not unlike the situation in Espinosa-Hernandez, Gonzalez stands convicted of serious and disturbing breaches of the

public trust. Without benefit of discovery and an evidentiary hearing, it is impossible to say that evidence of Gonzalez's misconduct is merely impeaching. Revelations at an evidentiary hearing might easily extend beyond that of mere impeachment, as concluded by the district court below, and it might likely lead to petitioners' acquittal in a second trial. To not have given the petitioners an opportunity to examine these issues at an evidentiary hearing does egregious harm to petitioners. Allowing the use of Gonzalez's testimony at trial without any opportunity to impeach him does violence to any sense of fairness. The verdict has been illegally obtained. The most rudimentary of the access-to-evidence cases impose upon the prosecution a constitutional obligation to report to a defendant and to the trial court whenever government witnesses lie under oath. This was not done a month prior to petitioners' trial. But criminal defendants are entitled to much more than protection against perjury.

Petitioners have a constitutionally protected privilege to request and obtain from the prosecution evidence that is either material to the guilt of petitioners or relevant to the punishment to be imposed. California v. Trombetta, 457 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413, 420 (1984). And the evidence of Gonzalez's perjury and criminal activities promote the reasonable probability of a different result with its disclosure. Pennsylvania v. Ritchie, 480 U.S. 39, 107 S. Ct. 989, 94 L. Ed. 2d 40 (1987).

As occurred in Ouimette, the prosecution team here enjoyed exclusive and peculiar privilege to fashion and shape Gonzalez as a credible witness against the accused. The prosecution's coverup and censorship of their preemptive activity is what remains as constitutionally actionable. Petitioners' trial was based upon prosecutorial concealment and not upon disclosure. Such discredited practices do violence to constitutional notions of justice and fair play which all

free people enjoy. Id. at 13. Had the jury not elected to believe Gonzalez, it is quite possible that petitioners would never have been convicted. See United States v. Shaffer, 789 F. 2d 682, 686 (9th Cir. 1986). The court below erred in not remanding for a new trial when provided with a plethora of Brady evidence and the only remedy is a remand for an evidentiary hearing or a new trial.

Finally, we must attempt to unravel the inextricable logic of the First Circuit's complete misapprehension of the sui generis case of Mesarosh v. United States, 372 U.S. 1, 77 S. Ct. 1, 1 L. Ed. 2d 1 (1956). The court below found that facts of Mesarosh "clearly distinguishable" from the matter sub judice. The court below, however erroneous, went further to say that Mesarosh did not apply to cases in which defendants seek a new trial under Fed. R. Crim. P. 33 "Impeachment" evidence. *Au contraire!* What this Court stated explicitly in Mesarosh is the following:

> It must be remembered that we are not dealing here with a motion for a new trial initiated by the defense, under Rule 33 of the Federal Rules of Criminal Procedure, presenting untruthful statements by a Government witness **subsequent to the trial** as newly discovered evidence affecting his credibility at the trial. Such an allegation by the defense **ordinarily** will not support a motion for a new trial, because new evidence which is "merely cumulative or impeaching" is not, according to the oft-repeated statement of the courts, an adequate basis for the grant of a new trial. (emphasis added).

Ibid. at 9.

To begin with, the conjunctive adverb "ordinarily" does not foreclose application of Mesarosh to a Rule 33 case. But the key phraseology completely misapprehended by the court below is "untruthful statements by a Government witness subsequent to the trial.." Here, as in Mesarosh the perjured testimony of the witness Gonzalez was several years **before** petitioners' trial. Contrary to the erroneous conclusions of the court below, Mesarosh is on all fours with this case. As this Court succinctly pointed out in Mesarosh, a perjury committed in a prior proceeding wholly

discredits the credibility of the same witness in a later proceeding and inasmuch as the dignity of the United States will not permit the conviction of any person on tainted testimony, there can be no other just result than a new trial. It matters not whether the government was aware or unaware of such taint. And the emphasis placed by the district court on the veracity of Gonzalez's trial testimony here is misplaced. It matters not where he perjured himself, only that the perjury occurred. Upon discovery of pervious trial perjury by a government witness, the trial court should decide whether the jury probably would have altered its verdict if it had the opportunity to appraise the impact of the newly-discovered evidence not only upon the factual elements of the government's case but also upon the credibility of the government witness.

When the court below adopted the position of the district court in affirming (see Appendix A) it accepted the premise that the

government became aware of Gonzalez's prior perjury one month before petitioners' trial. Given that circumstances and in light of similar facts in Mesarosh, (supra), where the United States conceded that the testimony of a key witness was or probably was untrue, there can be no question that a new trial was warranted. United State v. Lebowitz, 586 F. Supp. 265, 272 (W.D.Pa. 1984), aff'd., 746 F. 2d 1468 (3rd Cir. 1984).

Petitioners contend the court below erred in not applying the guiding principles enunciated in Mesarosh to this case.

CONCLUSION

For the reasons set forth above, a writ of certiorari should be issued to review the judgment and per curiam opinion of the Court of Appeals in this matter.[1]

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1. If this Court elects not to address the issues presented in this petition at the present time, it is requested that the writ issue and the matter be remanded to the Court of Appeals for redetermination in light of this Court's opinion in Mesarosh, (supra).

Respectfully submitted,

DANIEL JOSEPH MARAVILLA

RAFAEL JESUS DOMINGUEZ

Dated: March 24, 1994

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 93-1315

United States,
Plaintiff, Appellee,
v.
DANIEL JOSEPH MARAVILLA AND
RAFAEL JESUS DOMINGUEZ,
Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

[Hon. Hector M. Laffitte,
U.S. District Judge]

Before

Breyer, Chief Judge,
Selya and Boudin, Circuit Judges.

Daniel Joseph Maravilla, and Rafael Jesus Dominguez on brief pro se.
James P. Turner, Acting Assistant Attorney General, Jessica Dunsay Silver and Lisa J. Stark, Attorneys, Department of Justice, on brief for appellee.

September 28, 1993

Per Curiam. After reviewing the briefs of the parties and the record in this case, we

affirm the district court's decision essentially for the reasons stated in the court's order of July 10, 1992, denying appellants' motion for recusal, and the court's opinion and order of March 5, 1993, denying appellants' motion for a new trial. We note only that the district court did not abuse its discretion in not discussing in its decision the affidavit by Anibal Lugo Irizary. Being inadmissible, the allegedly newly discovered evidence in that affidavit would never have reached the jury and so could not have had any effect on the outcome of any retrial of appellants. See United States v. Ranney, 719 F.2d 1183, 1190 (1st Cir. 1983). For that reason, the representations in the affidavit do not constitute grounds for a new trial. See United States v. Wright, 625 F.2d 1017, 1019 (1st Cir. 1980) (the trial court may deny a motion for a new trial if it finds that any one of the requirements for a new trial is lacking; one requirement is that the newly discovered evidence would probably

effect an acquittal upon retrial of the defendant).

Affirmed.

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 93-1315

United States,
Plaintiff, Appellee,
v.
DANIEL JOSEPH MARAVILLA AND
RAFAEL JESUS DOMINGUEZ,
Defendants, Appellants.

JUDGMENT

Entered: September 28, 1993

This cause came on to be submitted on the briefs and the original record on appeal from the United States District Court for the District of Puerto Rico.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the District Court is affirmed.

By the Court:

Francis P. Scigliano, Clerk

[cc: Messrs. Maravilla, Dominguez, and Ms. Stark]

UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF PUERTO RICO

UNITED STATES OF AMERICA,
Plaintiff

v. Cr. No. 87-161-HL
DANIEL JOSEPH MARAVILLA Cr. No. 87-162-HL
and RAFAEL JESUS
DOMINGUEZ,
Defendants.

OPINION AND ORDER

For the assault, robber and murder of money courier Yamil Mitri Lajam, defendants Daniel Joseph Maravilla ("Maravilla") and Rafael Jesus Dominguez ("Dominguez"), both former United States Custom Officers, were convicted of: (1) depriving an "inhabitant of any State, Territory, or District" of a civil right, 18 U.S.C. Sec. 2 & 242 (Count I), (2) engaging in "robbery" and committing acts of "physical violence" affecting interstate commerce, 18 U.S.C. Sec. 2 & 1951(a) (Count II), (3) transporting stolen money interstate, 18 U.S.C. Sec. 2 & 2314 (Count III), (4) receiving or concealing stolen money that has moved interstate, 18 U.S.C. Sec. 2 & 2315 (Count IV), and (5) various instances of perjury and obstruction of justice, 18 U.S.C.

Sec. 1623, 1001, & 1503 (Counts V through VIII). Defendants were sentenced to 120 years imprisonment on several of the counts to run consecutively and 30 years imprisonment on the remaining counts to run concurrently with the 120 year sentence. The defendants were also ordered to pay a special monetary assessment of $50.

On June 28, 1990, the Court of Appeals for the First Circuit reversed the Count I conviction on the ground that the money courier's citizenship and the brevity of his planned stay within the United States placed him beyond the intended scope of the word "inhabitant" in the civil rights statute. The judgment of the district court was upheld with respect to the rest of the counts and the case was remanded for resentencing. United States v. Maravilla, 907 F.2d 216 (1st Cir. 1990).

On remand, the defendants received prison terms on the remaining counts totalling 50 years (20 years on Count II in addition to two terms of 10 years and two terms of 5 years on

the other counts, all to be served consecutively) plus $30,000 in fines. In a subsequent appeal, the sentences imposed by the district court were upheld by the First Circuit Court of Appeals.

On June 19, 1992, the defendants filed the instant motion for a new trial based on the discovery of new evidence. Defendants claim that some of this information was in the Government's possession prior to their trial and that, upon request, it was purposeful withheld due to its exculpatory nature, in violation of Brady v. Maryland, 373 U.S. 83 (1963).

STANDARD

The Court's limited inquiry is to determine whether the newly discovered evidence provides a sufficient basis for a new trial. The relevant standard in this Circuit is known as the Wright-Martin standard. To prevail on a motion for a new trial based on newly discovered evidence, the defendant must show that "(1) the evidence was unknown, or

unavailable, at the time of trial; (2) the failure to obtain the evidence was not due to a lack of diligence by the defendant; (3) the evidence was material, not merely cumulative or impeaching; and (4) the evidence will probably result in an acquittal of the defendant." United States v. Benavente Gomez, 921 F.2d 378, 382 (1st Cir. 1990); United States v. Glantz, 884 F.2d 1483, 1486 (1st Cir. 1989); United States v. Wright, 815 F.2d 818, 824 (1st Cir. 1987); United States v. Martin, 625 F.2d 1017, 1019 (1st Cir. 1980).

However, where the newly discovered evidence consists of Brady material, another standard exists to determine the need for a new trial. Under Brady, the government must, upon request, disclose evidence which is favorable to the accused and material either to guilt or punishment. Id. at 373 U.S. 83, 87, 983 S. Ct. 1194, 1196-97 (1963). Impeachment evidence, is evidence "favorable to an accused," and therefore, like exculpatory evidence, falls within the Brady

rule. United States v. Bagley, 473 U.S. 667, 676, 105 S. Ct. 3375, 3380. Materiality is tested by assessing whether "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 682, 105 S. Ct. 3383. "A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." Id.

DISCUSSION

I. Jose Gonzalez

Defendants claim that they were the denied an opportunity to impeach the testimony of Government witness Jose Gonzalez because favorable evidence was intentionally withheld by the prosecution. Defendants assert that in January, 1991, they became aware that prosecution witness Jose Gonzalez had been indicted and convicted on racketeering charges stemming from illegal activities he had engaged in while a member of the Metro-Dade County police force. They contend that, prior

to trial, the prosecution was aware of an on-going federal investigation into the racketeering activities of Jose Gonzalez and that despite their demands for the production of "favorable" and "impeachment" evidence, the prosecution withheld information regarding the probe into Gonzalez's activities.

In response to these allegations the Government has submitted the affidavits of Fernando Rivera, supervisory special agent in the Miami Field Division of the FBI; Daniel C. Kingston, Supervisor of the Police Corruption Squad in the Miami Field Division of the FBI, from April 1987 through March, 1989; and Criselda Ortiz, lead prosecutor in the case of United States v. Daniel Maravilla and Rafael Dominguez. Together these affidavits establish that the prosecutors responsible for this case in Puerto Rico possessed no information about and were unaware of any allegations concerning, Jose Gonzalez' illegal activities, prior to trial; that the small amount f information which was available about

Gonzalez in December 1986 was viewed with a great deal of skepticism by Fernando Rivera, the FBI special agent in Miami to whom it was related and was not, at the time, passed on to any other federal agents or prosecutors; that it was not until August, 1987 that the FBI Police Corruption Unit in Miami was contacted by local law enforcement authorities concerning the possible initiation of a Federal investigation of corruption inside the Metro-Dade Police Office and was apprised of reliable information concerning the criminal activity and perjury of Gonzalez and his partner Charles Orrett; and finally, that Daniel C. Kingston, then supervisor of the Police Corruption Unit in Miami, never related the allegations concerning Gonzalez to any agent or prosecutor involved in the present case, and indeed as not even aware of this prosecution.

Defendants correctly point out that the intentional withholding of information concerning Gonzalez by the prosecution would

place less stringent burden on the defense in seeking a new trial than if the information had simply been discovered from a neutral source. If prosecutorial misconduct is established, the defense would only have to demonstrate that the evidence was "material" under Brady. As mentioned above, "material" evidence for these purposes is evidence which crates a reasonable probability that the outcome of the trial would have been different, had such evidence been disclosed. Absent a showing of prosecutorial nondisclosure, however, Brady is inapplicable. Defendants insist that even if Brady is inapplicable to the facts of this case, the Court should apply the so-called Larrison rule rather than the "probability of reversal" standard of Wright-Martin. This rule has been applied where a motion for a new trial is based on an allegation that a material witness testified falsely at trial. United States v. Bonilla, 503 F. Supp. 626, 628 (D.P.R. 1980). The Larrison rule requires a court to be

"reasonably well satisfied" that the testimony was, in fact, false, and that without such testimony the jury "might have reached a different conclusion." Id., 503 F. Supp. at 628-29, citing, Larrison v. United States 24 F. 2d at 82, 87 (7th Cir. 1928); United States v. Wright, 625 F. 2d at 1020. "The threshold for granting a new trial under Larrison is that the trial judge be satisfied that the testimony was perjured." Bonilla 503 F. Supp. at 629; Wright, 625 F. 2d at 1020. If the Court declines to apply either of these two tests, the relevant standard is Wright-Martin, which requires the defendant to meet the heavier burden of demonstrating a probability that introduction of the evidence will result in his acquittal.

Based on the affidavits presented, the Court finds that defendants have not demonstrated the existence of any misconduct on the part of the prosecutors involved in this case. There is simply the part of the prosecutors involved in this case. There is

simply no evidence in the record that ny of the prosecutors in this case learned of the criminal activities and investigation of Gonzalez from federal or local authorities in Miami. Furthermore, applying either the Larrison rule or the Wright-Martin standard, the Court finds that the newly discovered evidence relating to Jose Gonzalez is insufficient to provide a basis for a new trial.

Under the Larrison rule, the Court must be "reasonable well satisfied" that the testimony in question was perjured. Based on our evaluation of the arguments of counsel and the facts presented in the record, the Court is not reasonably satisfied that Gonzalez' testimony was false. Gonzalez' testimony at trial related to the request he received from Dominiguez's ex-wife, Debroah Placey, one week after the disappearance of Yamil Lajam, to rebarrel a gun that defendant Dominguez had purchased from Gonzalez' gun shop in Miami. He was interviewed by the FBI with respect to

this encounter in 1985, testified to the Grand Jury in January 1987, and testified at trial in September 1987. His statements upon each of those occasions were consistent.

Furthermore, Gonzalez's testimony was corroborated by other evidence. Debroah Placey testified that she was asked by Dominguez to take the gun to Gonzalez's gun shop to replace the barrel. Business records from the gun shop documenting the transaction between Placey and Gonzalez were also introduced. Thus, the critical aspects of Gonzalez's testimony have remained consistent and are corroborated by independent offers of proof.

Additionally, Gonzalez's testimony in this case was entirely unrelated to any of the criminal activities for which he was ultimately indicted and convicted, unlike the perjured testimony he offered in the New Jersey trial. It appears from the record that Gonzalez's perjured testimony in the New Jersey proceeding was an attempt to cover up

his criminal activity. In this case, his testimony was limited to a discrete set of facts concerning his involvement in repairing dominguez's gun, conduct which in no way relates to the pattern of drug-related activities which he was attempting to conceal by perjuring himself in New Jersey.

Nor is it reasonable to believe that the newly discovered evidence raises the possibility that Gonzalez made false statements in this proceeding because he felt an obligation to the government to incriminate Dominguez. In 1985, Gonzalez was not under investigation. Indeed the incident which eventually led federal and state authorities to suspect Gonzalez of illegal activities had not yet occurred. Nor does it appear that Gonzalez knew of the investigation into his activities at the time of trial. It is noteworthy, therefore, that his testimony in 1985 was virtually identical to the statements he made before the Grand Jury and at trial. For these reasons, the Court is not reasonably

satisfied that Gonzalez perjured himself at any state in the proceedings against Maravilla and Dominguez.

Similarly, under the Wright-Martin standard, the introduction of evidence impeaching the credibility of Gonzalez is unlikely to produce a reversal of the convictions of Maravilla and Dominguez. First, as mentioned above, Gonzalez's testimony is largely cumulative. The testimony of Debroah Placey, s well as, the gun shop business records, are independent sources of evidence of the transaction which took place concerning Dominguez's revolver. Second, s independent sources of proof, Placey's testimony and the records from the gun shop dispel any reasonable doubt as to the veracity of Gonzalez's testimony. Without Gonzalez's testimony there remains sufficient evidence for a conviction. Thus, the Court holds that defendants have not met their burden under the Wright-Martin standard of demonstrating the need for a new trial based

on the newly discovered evidence relating to Jose Gonzalez, because they have not shown a probability of reversal.

To the extent that the defense bases its motion for a new trial on the subsequent conviction of Jose Gonzalez, the Court finds without hesitation that a new trial is not warranted. Since Gonzalez's conviction was delivered until 1991, this aspect of the defense's motion must be evaluated under the Wright-Martin standard applicable to newly discovered evidence obtained from a neutral source. Applying this standard, the Court finds that Gonzalez's conviction has only impeachment value and probably would not bring about acquittal of the defendants. The conviction of Gonzalez, therefore, cannot constitute the basis for a new trial.

II. Rafael Criado

Defendants also base their motion for a new trial on allegations that Dr. Rafael Criado, the forensic pathologist who performed the autopsy on Yamil Lajam and testified

regarding his findings, conspired to fix autopsy reports to conform to the official police versions of the causes of deaths which occurred at Cerro Maravilla. The Court agrees with plaintiffs that this allegation fails to satisfy several prongs of the Wright-Martin standard. First, this evidence has impeachment value only. Second, there has been no showing that presentation of this evidence would probably produce an acquittal. Third, the allegations make no suggestion that Dr. Criado perjured himself or falsified documents in connection with the autopsy he performed in this case. Furthermore, as the government correctly points out, under Fed. R. Evid. 608(b), this type of impeachment evidence can only be introduced through inquiries on cross-examination and not through extrinsic evidence. Because the examining party is required to accept the answer of the witness, the effectiveness of this impeachment evidence would, in all likelihood, be negligible. Accordingly, defendants are not

entitled to a new trial on the basis of this evidence.

III. Torres-Maldonado Gang

Defendants also point to the similarities between the pattern of criminal activity perpetrated in Puerto Rico by the so-called Torres-Maldonado gang and the circumstances surrounding the murder of Yamil Lajam, and claim that the evidence of this criminal enterprise suggests that members of the Torres-Maldonado gang, not the defendants, are responsible for this crime. To the extent that defendants rely upon the federal indictment returned against members of this gang on November 24, 1986, as the "exculpatory evidence" which justifies a new trial, they cannot claim that this information is "newly discovered." The indictments issued in the Torres-Maldonado conspiracy became a matter of public record in November, 1986. This means that information regarding the Torres-Maldonado conspiracy was available to the defendants some eight or nine months prior to

their trial. Accordingly, the bulk of information relating to the Torres-Maldonado conspiracy cannot provide the basis for granting a new trial because the defense cannot show that this evidence was unavailable to them prior to trial, or that their failure to obtain it did not stem from lack of diligence.

Defendants also rely on three letters written by one of the parties charged in the Torres-Maldonado case, Alejo Maldonado Medina[1], to Maravilla's wife. In a letter dated June 27, 1990 Maldonado remembers an occasion in which a man named Hector Acevedo was involved in a conspiracy to rob someone who was to arrive at the San Juan airport from a foreign location. To the best of his recollection Maldonado gave this information to the federal authorities at the time of his arrest in September, 1982. However, Maldonado

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[1]See, United States v. Alejo Maldonado Medina, 761 F.2d 12 (1st Cir. 1985); United States v. Alejo Maldonado Medina, 570 F. Supp. 853 (D.P.R. 1983) for the details of Maldonado's indictment and conviction.

also states that none of his associates had ever mentioned "Mitri" [Yamil Lajam] to him as a possible victim and that he never heard any of his associates accept responsibility for involvement in Mitir's robbery and murder.

Apparently, in response to Mrs. Maravilla's request that he elaborate on the information he provided in the June 27, 1990 letter, Maldonado explains, in a letter dated August 8, 1990, that at some point in late 1981 or early 1982, he was approached by Hector Acevedo concerning the possibility of robbing an individual who supposedly made regular trips to Puerto Rico carrying large sums of cash. Maldonado does not remember if he learned of the individual's place of residence or nationality, but recalls not being told his name. Maldonado relates that on one occasion, however, he went to the airport with Acevedo and a man named Cesar Caballero to await the arrival of their intended victim. According to Maldonado, while they were at the airport they were

spotted and engaged in conversation by a undercover agent named Victor Franco, who apparently suspected them of some wrongdoing. Franco's presence foiled their plans that day, but Maldonado claims Acevedo asked him, and he refused, to return to the airport to finish the task. Maldonado also writes that Hector Acevedo laundered part of the money obtained through the kidnapping of Mario Conseugro (a crime later charged in the Torres-Maldonado case) through a "dominicano" in Santo Domingo.

In the October 20, 1990 letter, Maldonado states that he frequently heard mention, in his offices, of a dominican man, related to Mitri [Yamil Lajam], who was known both as a drug trafficker and as someone who laundered money for certain people in Maldonado's office. It was also believed that he ran a large undocumented aliens scheme. Based on this information, defendants claim, first, that if Maldonado had related this information to federal agents at the time of his arrest then members of the Torres-Maldonado gang

should have "automatically become prime suspects in the Lajam kidnapping, robbery and murder." Second, the defense contends that the prosecution failed to release any information about members of the Torres-Maldonado gang being suspects in this case in response to their requests for exculpatory and/or favorable information. Finally, defendants assert that they should be permitted to mount a "reverse 404(b)" defense and disprove the Government's case by showing that the actual perpetrators of crime in the instant case were members of the Torres-Maldonado gang.

For its part, the Government denies that any of the individuals indicted in connection with the Torres-Maldonado conspiracy were subjects or targets of investigations in this case, and states that federal authorities obtained no evidence showing that these individuals were involved in the Lajam murder.

Absent stronger proof that the Government had the information contained in the Maldonado

letters in its possession at the time it investigated the Lajam incident and knowingly withheld it, the Court cannot accept Maldonado's statement to the effect that "to the best of his recollection" he provided this information to the federal agents as the basis for a finding of prosecutorial misconduct in this case. However, amusing arguendo that Maldonado did, in fact, provide the information contained in his June 27 and August 8, 1990, letters to federal authorities at the time of his arrest in 1982, the Court would be required to analyze the impact of the evidence on the jury's judgment according to the standard laid out in Brady. Brady requires the Government to disclose evidence in its possession that is both favorable to the accused and material. Id. at 373 U.S. 83, 87, 83 St. Ct. 1194, 1196-1197. The evidence contained in Maldonado's letters can only be characterized as exculpatory, since it does not go to the credibility of any witness. Thus, to pass the Brady materiality threshold

the defendants must show that this newly discovered exculpatory evidence creates a reasonable probability that the result of the proceeding would have been different had it been disclosed. Badley, 473 U.S. at 682, 105 S. Ct. at 3383. Under Ouimette v. Moran, 942 F. 2d 1, 11 (1st Cir. 1991), the First Circuit applies an even stricter standard of materiality where "prosecutorial misconduct" and a "corruption of the truth seeking function of the trial process" is shown, whereby a conviction is set aside if there is any reasonable likelihood that such conduct could have affected the judgment of the jury. However, in Ouimette the First Circuit, agreeing with the District Court, made a specific finding based on the evidence of record, that the prosecutor in the case had knowingly withheld information from the defense. Similarly, in Brady, there was no doubt that the prosecutor had, in fact, suppressed a codefendant's confession to the actual homicide. On the record before the

Court in this case, we simply cannot make a similar finding. Maldonado's recollection that he informed authorities of the events related in this June and August letters constitutes far less compelling evidence of misconduct than that presented in either Brady or Ouimette. Simply put, there is insufficient evidence of prosecutorial misconduct to apply a strict standard of materiality to the evidence contained in Maldonado's letters. Accordingly, we analyze the evidence contained in Maldonado's letters to Mrs. Maravilla according to the standard set forth in Wright-Martin for neutrally discovered new evidence.

Under this standard, the Court finds that the evidence in question fails to meet the probability of reversal prong of the standard. One of the most interesting aspects of Maldonado's letters is precisely what they do not say. There is no information in the letters placing a member of the Torres-Maldonado gang at the airport or the El

Yungue Forest on the date of the crime. Moreover, Maldonado explicitly states that he never knew of anyone mentioning any involvement in the Lajam incident. The material only suggests, but does not confirm, a link between the individual who Acevedo was conspiring to rob and the "dominicano" referred to at other points in the material. In short, Maldonado's recollections are riddled with factual lacunae which would severely limit the effectiveness of this evidence before a jury. Accordingly, the Court finds that this material is insufficient to produce a probability of reversal, and therefore, cannot entitle defendants to a trial.

IV. Ernest Urrutia

Defendant's fourth and final claim for a new trial is based on alibi evidence which Ernest Urrutia can allegedly supply. Defense counsel interviewed urrutia as a potential alibi witness but chose ultimately not to present his testimony at trial because Urrutia

could not testify under oath that the date of his lunch with defendants was September 10, 1982. According to his signed Statements of Facts, Urrutia now seems prepared to testify that he had lunch with the Defendants on a Friday in September, that he left for lunch with defendants in a Government vehicle at about 11:30-11:45 AM and was back in his office for an important prescheduled conference call by 1:00-1:15 PM, and that at lunch he invited Maravilla to play golf the following day which was a Saturday, but Maravilla declined because he was going to be flying to Miami that Friday afternoon. The gist of this information was available to the defense prior to trial. The only difference between Urrutia's present testimony and what he apparently remembered prior to trial is that Urrutia now appears certain that his lunch with the defendants took place on a Friday in September. However, the government correctly points out that Urrutia is still unable to testify as to the exact date of this

lunch and despite several attempts, he has also been unable to locate records of receipts which document defendants' claims that the Friday in question was the date of Lajam's disappearance. The Court, therefore, finds that in light of the other evidence adduced at trial, Urrutia's statement that he was with Maravilla and Dominguez for less than two hours on a Friday afternoon in September, absent other compelling alibi evidence, would not produce an acquittal, as required to obtain a new trial.

Defendant Dominguez also moves for a reduction of sentence. This matter is addressed to the sound discretion of the Court. In this case the Court finds no reason to reduce the sentence imposed.

CONCLUSION

For the foregoing reasons, the Court denies defendants' motion for a new trial as well as defendant Rafael Dominguez's motion for a reduction of sentence.

IT IS SO ORDERED.

San Juan, Puerto Rico, March 5, 1993.

/S/ HECTOR N. LAFFITTE
U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 93-1315

UNITED STATES,
Plaintiff, Appellee,
v.
DANIEL JOSEPH MARAVILLA AND
RAFAEL JESUS DOMINGUEZ,
Defendants, Appellants.

Before

Breyer, Chief Judge,
Torruella, Selya, Cyr, Boudin and Stahl,
Circuit Judges.

ORDER OF COURT

Entered November 16, 1993

Petitioners' petition for rehearing and suggestion for rehearing en banc is denied. The petition describes no point of law or fact in which we misapprehended or overlooked in our decision, see Fed. R. App. P. 40(a), nor has it shown that reconsideration of the decision by the full court is necessary to ensure uniformity of decision making within the circuit or to resolve a question of "exceptional importance." See Fed. R. App.

35(a).

Petitioners claim that Mesarosh v. United States, 352 U.S. 1 (1956), requires that they be given a new trial. We disagree. The facts of that case are clearly distinguishable. See Id. at 10 (describing the salient facts). Moreover, the Supreme Court explicitly said in Mesarosh that its ruling did not apply to cases such as the present one, in which defendants seek a new trial under Fed. R. Crim. P. 33 because of newly discovered impeachment evidence. Id. at 9.

Petitioners also say that his court should have applied the rule in Larrison v. United States, 24 F.2d 82 (7th Cir. 1928), in determining whether the prosecutor's alleged suppression of impeaching evidence constituted grounds for a new trial. We have recently stated the applicable standard for this circuit. See Ouimette v. Moran, 942 F. 2d 1, 11 (1st Cir. 1991) (prosecutorial suppression of impeachment evidence is grounds for a new trial if there is a "reasonable possibility"

that the jury convicted the defendant because of testimony given by a witness whose credibility could have been impeached but was not because of prosecutorial suppression of evidence). We see no reasonable possibility that the jury which convicted petitioners would have acquitted them if Jose Gonzalez's credibility had been impeached. Even without Gonzalez's testimony, ample evidence was introduced at trial to support petitioners' convictions. See United States v. Maravilla, 907 F.2d 216, 218-19 (1st Cir. 1990) (describing the evidence given at petitioners' trial). Therefore, even if we were to assume that petitioners' allegations of prosecutorial misconduct were true, a new trial would not be warranted.

Petition for rehearing and suggestion for rehearing en banc denied.

By the Court:

/S/ FRANCIS P. SCIGLANO
Clerk.

AMENDMENT V TO THE UNITED STATES CONSTITUTION

No persons shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation.

FILED
JUN - 1 1994
OFFICE OF THE CLERK

No. 93-1522

In the Supreme Court of the United States

OCTOBER TERM, 1993

DANIEL JOSEPH MARAVILLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the district court abused its discretion in denying petitioners' motion for a new trial based on newly discovered evidence.

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DANIEL JOSEPH MARAVILLA, ET AL., PETITIONERS

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A3) is unpublished, but the decision is noted at 7 F.3d 219 (Table). The opinion of the district court (Pet. App. B1-B27) is not reported. Prior opinions of the court of appeals are reported at 951 F.2d 412 and 907 F.2d 216.

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1993. Pet. App. A4. A petition for rehearing was denied on November 16, 1993. Pet. App. C1. The petition for a writ of certiorari was filed on February 14, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners, who were special agents with the United States Customs Service, were indicted for various federal offenses as a result of their having abducted, robbed, and murdered Yamil Mitri Lajam, a citizen of the Dominican Republic. Following a jury trial in the United States District Court for the District of Puerto Rico, petitioners were convicted of depriving an inhabitant of the United States of his civil rights, in violation of 18 U.S.C. 242; robbery, in violation of 18 U.S.C. 1951(a); receiving and transporting stolen money, in violation of 18 U.S.C. 2314 and 2315; and making false statements and obstruction of justice, in violation of 18 U.S.C. 1623, 1001, and 1503. The court of appeals reversed their convictions on the Section 242 count, affirmed their convictions on all other counts, and remanded to the district court for resentencing. In the district court, petitioners moved for a new trial on the ground of newly discovered evidence. The district court denied their motion, and the court of appeals affirmed.

1. The evidence at trial showed that, on the morning of September 10, 1982, Mitri, a Dominican citizen who managed a money exchange business, flew to Puerto Rico carrying approximately $700,000. Unbeknownst to anyone other than his employer, Mitri planned to go directly from the airport to a bank in downtown San Juan to deposit the money. At the San Juan airport, Mitri proceeded to the United States Customs Office, declared the money he was carrying, and was interviewed by petitioners. *United States* v. *Maravilla*, 907 F.2d 216, 217-218 (1st Cir. 1990), cert. denied, 112 S. Ct. 1960 (1992).

After the interview, Mitri left the customs office with petitioner Dominguez. Mitri was never seen alive again. Dominguez was not seen at the customs office for four to

five hours after departing with Mitri. Petitioner Maravilla also left the customs office around the same time. He too was not seen again the rest of the day. 907 F.2d at 217-218.

Mitri's decomposed body was found ten days later about 20 miles from the airport. 907 F.2d at 217-218. Two forensic pathologists testified at petitioners' trial. Dr. Joseph Davis testified that Mitri's decomposed body was in a state consistent with his having been shot during the five hours that both Dominguez and Maravilla were away from the customs office on September 10. *Id.* at 219-220. Another forensic pathologist, Dr. Ralph Criado, testified that the victim's date of death was between September 8 and 12. *Id.* at 219.

On September 10, the date Mitri disappeared, Dominguez and Maravilla each had less than $100 in the bank. Beginning on September 10, both petitioners had large quantities of cash. On the night Mitri disappeared, they purchased first-class plane tickets with cash and flew to Miami carrying a brief case filled with approximately $265,000 in cash. In Miami, they paid Wayne Sausmer $12,000 to deposit the money in numbered, unnamed Swiss bank accounts. Shortly thereafter, Dominguez gave a girlfriend $7000 in cash, bought $3500 in postal money orders, had a friend deposit $5000 in a Miami bank account, and gave an uncle $15,000 to buy a car. In February, 1982, Dominguez agreed to make a cash down payment of $30,000 for a new house. Meanwhile, Maravilla deposited $18,300 cash in a bank account in San Juan, gave $2000 to his parents, and was detained by authorities in Baranquilla, Columbia, for failing to declare $53,700 in cash that he was carrying. 907 F.2d at 218-219.

Petitioners provided several false stories to customs agents, the FBI, and/or the grand jury as to the source of

the money. Sausmer, following petitioners' advice, initially did the same, but eventually told the FBI, the grand jury, and the trial jury that petitioners' stories about the cash were all false. 907 F.2d at 218-219.

Dominguez's girlfriend, Debra Placey, also testified that, on the weekend of September 17, Dominguez gave her a gun and asked her to take it to a gun shop and have the barrel removed and returned to him. 907 F.2d at 219, 221. Jose Gonzales, the owner of the gun shop, confirmed Placey's testimony, and records of the gun shop were introduced as further confirmation. Pet. App. B11; *United States* v. *Maravillla*, 907 F.2d at 221.

2. On January 28, 1990, the court of appeals affirmed in part and reversed in part, and remanded to the district court for resentencing. 907 F.2d at 216. The court of appeals held that the evidence was sufficient as to all counts, but concluded that petitioners could not be convicted of a violation of 18 U.S.C. 242, because the victim, a foreigner who intended to visit the United States for only a few hours, was not an "inhabitant" within the meaning of the statute. 907 F.2d at 219, 228.

3. On remand, the district court sentenced each defendant to 50 years' imprisonment and a fine of $30,000. The court of appeals affirmed petitioners' sentences. *United States* v. *Maravilla*, 951 F.2d 412, 414 (1st Cir. 1991). This Court denied a writ of certiorari. 112 S. Ct. 1960 (1992).

4. Petitioners filed a motion for a new trial pursuant to Fed. R. Crim. P. 33, based on newly discovered evidence. Pet. App. B3. Petitioners argued, *inter alia*, that they were entitled to a new a trial because the government intentionally withheld information that (1) gun shop owner Jose Gonzalez had previously testified falsely at a New Jersey state proceeding about his own illegal activities while a police officer for the Dade

County Police Department, and (2) Dr. Ralph Criado, a pathologist and government witness, had falsified an autopsy report in another case. Pet. App. B5, B15.

The district court denied petitioners' motion without a hearing. With regard to the newly discovered evidence concerning Gonzalez, the district court rejected petitioners' claim that the government impermissibly withheld any information. Pet. App. B6-B7, B9-B10. The district court found that petitioners "have not demonstrated the existence of any mis-conduct" and "[t]here is simply no evidence in the record that any prosecutors in this case learned of the criminal activities and investigation of Gonzalez from federal or local authorities in Miami." Pet. App. B9-B10. The court also concluded that such evidence did not provide a basis for a new trial because it would have been "unlikely to produce a reversal." Pet. App. B13. In support of that conclusion, the court found that Gonzalez's testimony in this case was: (1) "largely cumulative"; (2) truthful, as evidenced by the fact that it was "corroborated by independent offers of proof"; (3) nonessential, since even "[w]ithout Gonzalez's testimony there remain[ed] sufficient evidence for a conviction"; and (4) unrelated to his false testimony at a proceeding in New Jersey. Pet. App. B13, B11.

The district court also rejected petitioners' claim that newly discovered evidence that Dr. Criado had falsified an autopsy report in another case justified a new trial. Pet. App. B14-B16. The court reasoned that a new trial was not warranted because: (1) "there has been no showing that presentation of this evidence would probably produce an acquittal"; (2) "the allegations make no suggestion that Dr. Criado perjured himself or falsified documents in connection with the autopsy he performed in this case"; and (3) the newly discovered

evidence was inadmissible extrinsic evidence of credibility under Fed. R. Evid. 608(b) and would have been of "negligible" effectiveness if used on cross-examination of Criado. Pet. App. B15.

5. The court of appeals affirmed, "essentially for the reasons stated in * * * the [district] court's opinion and order." Pet. App. A1-A2. The court of appeals also wrote a brief opinion denying petitioners' request for rehearing and suggestion for rehearing en banc. Pet. App. C1. Applying *Ouimette* v. *Moran*, 942 F.2d 1, 11 (1st Cir. 1991), it held that even if the government impermissibly withheld evidence regarding Gonzalez, petitioners would not be entitled to a new trial because there is "no reasonable possibility that the jury * * * would have acquitted them if Jose Gonzalez's credibility had been impeached. Even without Gonzalez's testimony, ample evidence was introduced at trial to support petitioners' convictions." Pet. App. C3. The court of appeals also held that *Mesarosh* v. *United States*, 352 U.S. 1, 9 (1956), did not dictate a different result, because "the facts of that case are clearly distinguishable" and *Mesarosh* does "not apply to cases such as the present one, in which defendants seek a new trial under Fed. R. Crim. P. 33 because of newly discovered impeachment evidence." Pet. App. C2.

ARGUMENT

1. Petitioners contend (Pet. 8-9) that the district court erred in denying their motion for a new trial without holding a hearing. It has long been settled that a district court generally may deny a motion for a new trial without an evidentiary hearing. See, *e.g.*, *United States* v. *Winter*, 663 F.2d 1120, 1155 (1st Cir. 1981), cert. denied, 460 U.S. 1011 (1983); *United States* v. *Cardarella*, 588 F.2d 1204, 1205 (8th Cir. 1978); *United States* v. *Nace*,

561 F.2d 763, 772 (9th Cir. 1977); *United States* v. *Hamilton*, 559 F.2d 1370, 1373 (5th Cir. 1977). Moreover, petitioners concede (Pet. 8-9) that the district court's determination not to hold a hearing in this context is subject to review only under an abuse of discretion standard.

In this case, the district judge who denied the motion for a new trial was the judge who presided at petitioners' trial. After careful consideration of the materials submitted to the district court by petitioners and the government's opposing affidavits, see Pet. App. B5-B16, the court decided that resolution of any factual disputes was unnecessary to the court's determination that petitioners were not entitled to a new trial. Further review to consider whether the district court abused its discretion in reaching that decision is not warranted.

2. Petitioners contend (Pet. 11-12) that the courts below applied the wrong legal standard when evaluating the newly discovered evidence. Relying on *Larrison* v. *United States*, 24 F.2d 82, 87 (7th Cir. 1928), petitioners argue that the district court should have considered whether the newly discovered evidence that Gonzalez had previously testified falsely and Criado had falsified an autopsy report "might have caused the jury to reach a different result" rather than rejecting their motion because such evidence was "unlikely to produce a reversal."

In *Larrison*, 24 F.2d at 87, the Seventh Circuit set forth the standard to be applied to a motion for a new trial when a defendant alleges that a material witness testified falsely at trial. In such circumstances, a new trial should be granted when, *inter alia*, "[t]he court is reasonably well satisfied that the testimony given by a material witness is false [and] [t]hat without it the jury *might* have reached a different conclusion." *Ibid.*

Larrison is inapposite here, because there is no evidence that either Gonzalez or Criado testified falsely at petitioners' trial. With regard to Gonzalez's testimony, which "was limited to a discrete set of facts concerning his involvement in repairing Dominguez's gun," the district court found there is no "reasonable doubt as to [its] veracity." Pet. App. B12, B13. As the court explained, "[t]he testimony of Debra Placey, as well as * * * the gun shop business records, are independent sources of evidence of the transaction * * * concerning Dominguez's revolver." Pet. App. B13.

As to the newly discovered evidence regarding Dr. Criado, the district court found that the evidence "make[s] no suggestion that Dr. Criado perjured himself or falsified documents in connection with the autopsy he performed in this case." Pet. App. B15. Since there is no evidence that Gonzalez's or Criado's trial testimony was false, the court of appeals did not err in refusing to apply *Larrison*.

3. Petitioners argue (Pet. 16-17) that the court of appeals' decision is inconsistent with *Ouimette* v. *Moran*, 942 F.2d 1, 9-12 (1st Cir. 1991),[1] because the government in their view knowingly withheld evidence that Gonzalez had previously testified falsely, in violation of *Brady* v. *Maryland*, 373 U.S. 83 (1963).[2] Further review would not be warranted to resolve any conflict

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[1] Petitioners also assert that the First Circuit's decision in this case is inconsistent with *United States* v. *Lau*, 828 F.2d 871 (1st Cir. 1987), cert. denied, 486 U.S. 1005 (1988). In that case, however, the First Circuit simply held that there had been no *Brady* violation because the withheld evidence was not "material" to guilt or innocence. *Id.* at 877. The First Circuit's decision in this case is entirely consistent with that holding.

[2] Petitioners have never alleged that the government withheld information regarding Dr. Criado.

between two decisions of the First Circuit. *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957). In any event, there is no such conflict in this case.

In *Ouimette*, the First Circuit applied a "strict standard of materiality" under which a new trial would be ordered so long as there was "a reasonable possibility" that the "knowing prosecutorial suppression of evidence 'could have affected the judgment of the jury.'" 942 F.2d at 11 (quoting *United States* v. *Agurs*, 427 U.S. 97, 103 (1976)). In this case, the court stated that it was applying the *Ouimette* standard. Pet. App. C2-C3. Although the court varied the wording of that standard slightly, it stated on denial of rehearing that it "[saw] no reasonable possibility that the jury which convicted petitioners would have acquitted them if Jose Gonzalez's credibility had been impeached." Pet. App. C3.[3] That holding in turn was based on the court's review of the record and on the district court's conclusion that Gonzalez's testimony was cumulative, that the newly discovered evidence was collateral to the substance of Gonzalez's trial testimony, and that Gonzalez was not an essential witness since there was "sufficient evidence for a conviction" even without him. Pet. App. B13, B11-B12. Further review is not warranted to determine whether the fact-specific conclusions reached by both courts below were correct.

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[3] The record reflects that Gonzalez was not a key witness. In concluding that the evidence was sufficient to sustain petitioners' convictions, the court of appeals outlined six discrete areas of circumstantial evidence establishing petitioners' guilt, only one of which pertained to Dominguez's gun. *United States* v. *Maravilla*, 907 F.2d at 219. As to that area, the court focused exclusively on the testimony of Debra Placey, Dominguez's girlfriend, stating, "Dominguez asked a friend to take his gun to Miami and to have a new barrel put on the gun." *Id.* at 219.

The court of appeals' determination that petitioners were not entitled to a new trial under the *Ouimette* standard necessarily leads to the conclusion that there was no *Brady* violation. The *Ouimette* standard—whether there is "a reasonable possibility" that withholding the evidence affected the jury's verdict—is more favorable to petitioners than the standard ordinarily applicable in *Brady* cases in which there has been no showing of prosecutorial misconduct. See *United States* v. *Bagley*, 473 U.S. 667 (1985) (plurality opinion) (whether there is "a reasonable *probability* that, had the evidence been disclosed to the defense, the result of the proceeding would have been different") (emphasis added); see also *id.* at 685 (White, J., concurring in part and concurring in the judgment). In light of the district court's finding that there was no prosecutorial misconduct or deliberate withholding of evidence in this case, the court of appeals should not have given petitioners the benefit of the more favorable *Ouimette* standard.[4] In any event, since petitioners were not entitled to a new trial under the *Ouimette* standard, they are certainly not entitled to a new trial under the less favorable standard ordinarily applicable in *Brady* cases.

4. Nor are petitioners correct in asserting (Pet. 22) that the court of appeals' decision is inconsistent with

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[4] The First Circuit in *Ouimette* held that its "strict" standard is applicable only where there is deliberate prosecutorial misconduct. See *Ouimette*, 942 F.2d at 10, 11. In this case, the district court found "that defendants have not demonstrated the existence of any misconduct on the part of the prosecutors involved in this case," Pet. App. B9, and that "[t]here is simply no evidence in the record that any of the prosecutors in this case learned of the criminal activities and investigation of Gonzalez" prior to petitioners' trial. Pet. App. B9-B10.

this Court's decision in *Mesarosh* v. *United States*, 352 U.S. 1 (1956). In *Mesarosh*, this Court remanded a case for a new trial based on the Solicitor General's representation that a witness whose testimony was material to the convictions of some of the defendants had testified falsely at other proceedings. However, as the Court in *Mesarosh* acknowledged, "[s]uch an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not * * * an adequate basis for the grant of a new trial." *Id.* at 9. See also *id.* at 12 n.7 (situation "entirely distinct from that of the ordinary defense motion for new trial"). By its terms, therefore, *Mesarosh* has no application to this case.

In any event, the newly discovered evidence in *Mesarosh* demonstrated that a trial witness had perjured himself in other proceedings with respect to the same issues on which he had testified at trial. Indeed, the Court in *Mesarosh* noted that it might not have ordered a new trial had there been a way for the district court to find "that [the witness's] other falsehoods were differentiated from his [trial] testimony." *Id.* at 13. By contrast, in this case the district court found that Gonzalez's trial testimony was "entirely unrelated" to his previous false statements. Pet. App. B11. Nothing in *Mesarosh* suggests that a new trial is required in those circumstances.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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